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IN THE

Supreme Court of the United States

October Term, 1957

No. [redacted] 100

HARRY J. ALKER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957.

No.

HARRY J. ALKER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HARRY J. ALKER, JR., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on May 15, 1958.

OPINION BELOW.

The opinion of the court of appeals (Appendix A hereto, pp. A3-A7, *infra*) has not yet been reported.

JURISDICTION.

The judgment of the court of appeals was entered on May 15, 1958 (Appendix B hereto, p. A8, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Petitioner was indicted and tried on two indictments. The first, which charged him with conspiracy, was dismissed just before the case was submitted to the jury. The second charged three substantive offenses, on all of which he was convicted. On appeal he contended that the last two counts did not charge offenses; the Government stated that it "is agreeable that they be dismissed by the court and the sentence thereon vacated"; and this was done. Petitioner's conviction on the one count was affirmed.

The question presented is whether, in view of the closeness of the case on the single count which was sustained, and in view of the damaging nature of the counts that were abandoned on appeal, the resultant prejudice requires reversal for basic unfairness.

The question presented may be alternatively stated as follows:

Whether it is open to the prosecution to use at a trial, as vehicles for introducing evidence that is damaging to a defendant and results in a conviction, additional counts which on appeal it concedes did not state any offense.

STATUTES INVOLVED.

The statutes involved are set out in Appendix C hereto, pp. A9-A10, *infra*.

STATEMENT.

In view of the nature of the question presented, only the facts relevant thereto are set forth here.

(A) *Proceedings in the district court.* Petitioner, a lawyer, was tried on two indictments. Indictment No. 18,730 (3a-4a)[1] was in three counts. Count 1 alleged that petitioner violated § 894(b)(2)(C), I. R. C. 1939 (Appendix C hereto, *infra* p. A9), by wilfully attempting to evade and defeat the estate tax imposed upon the estate of Winfred S. Hurst, deceased, by filing and causing to be filed a false and fraudulent estate tax return wherein he stated that the cash on hand belonging to the decedent was $3,046.93, whereas he well knew that the correct sum of cash on hand was $38,046.93. Count 2 alleged that petitioner violated § 7207, I. R. C. 1954 (Appendix C hereto, *infra* p. A10), by submitting to delegates of the Secretary of the Treasury, on April 7, 1955, certain documents which he knew to be fraudulent and false as to material matters. Count 3 alleged that petitioner further violated § 7207, I. R. C. 1954, by delivering to a delegate of the Secretary of the Treasury, on April 29, 1955, statements and documents known by him to be fraudulent.

Indictment No. 18,731 alleged that petitioner conspired, in violation of the general conspiracy provision (18 U. S. C. § 371), with Horace S. Rhoads, who was also indicted, and with Eugene Carpenter, Sr., who was not indicted, to attempt to evade and defeat the estate tax imposed upon the estate of Winfred S. Hurst, deceased, by delivering to delegates of the Secretary

1. Figures with the suffix "a" refer to the Appendix filed by petitioner in the court below.

of the Treasury, certain documents known by the conspirators to be fraudulent and false in material matters, and to conceal material facts concerning matters within the jurisdiction of a department or agency of the United States.

Rhoads was tried on Indictment 18,731 at the same time that petitioner was tried on Indictments 18,730 and 18,731. Shortly after the conclusion of the prosecution's case in chief, Rhoads' motion for acquittal was granted (210a). At the close of all the evidence, the court granted petitioner's motion for acquittal with respect to the conspiracy indictment (248a).

Thereafter the substantive indictment, No. 18,730, was submitted to the jury, which returned a verdict of guilty on each of the three counts (300a).

Petitioner filed timely motions in arrest of judgment, for judgment of acquittal and for a new trial (302a-306a), which alleged (306a) that—

> "4. The court erred in permitting the evidence in support of counts Nos. 2 and 3 of the indictment to be considered by the jury because neither count sufficiently charges an offense against the United States, and defendant was prejudiced in having his guilt under count No. 1 considered together with his guilt under the defective counts."

This motion was denied (1a); a motion for reconsideration (307a) was similarly denied (2a); and petitioner was sentenced to six months' imprisonment on each count, the sentences to run concurrently, and to a fine of $8,000 on Count 1 and of $1,000 each on Counts 2 and 3 (301a, 308a).

(B) *Facts bearing on Count 1.* Count 1 charged an attempt to evade and defeat the estate tax imposed

on the Estate of Winfred S. Hurst, deceased, by filing, etc., an estate tax return in which petitioner, Hurst's executor (11a), "stated that the cash on hand belonging to said decedent was the sum of $3,046.93, whereas, as he then and there well knew, the correct sum of such cash on hand was $38,046.93, and upon which understated and unreported cash of $35,000, as the defendant then and there well knew, there was imposed by law and due and owing to the United States of America a tax of $9,904.91" (3a).

The proof on both sides under the foregoing allegations covered a wide range.

(i) One issue was whether, when the decedent's safe was opened in petitioner's presence and was found to contain seven packages of bills, each package consisted of $500 or of $5,000—an aggregate difference of $31,500.

Mrs. Roth—a close friend of the decedent (47a) and ultimately a legatee under his will (41a)—and her daughter Jane, also a legatee (54a), both testified that they were present, along with petitioner, the alleged co-conspirator Carpenter, and a secretary, when decedent's safe was opened shortly after his death (26a-38a, 52a-56a). Neither witness knew how much cash was taken out of the safe (50a-51a, 59a), but both testified that there were seven packages of bills (28a, 52a) and that petitioner said that there was $500 in each package (34a, 52a). Both were then permitted to state, over objection (34a-37a, 52a), that the co-conspirator Carpenter then said, "No, there is $5,000 in each package," and that petitioner remained silent (36a, 52a).

Carpenter was not called by the Government as a part of its case in chief, but only as a rebuttal witness.

When he testified, Indictment 18,731, which named him as a co-conspirator, had not yet been dismissed. He was not asked regarding the amount of money in each package, but he testified that he saw no figures written on the band of paper that held each package together (Tr. 1064-1065).[2]

(ii) Another issue was whether, regardless of how much money was in the safe, it was the property of the decedent.

Petitioner's consistent position, reinforced by the statements of Carpenter, the decedent Hurst's confidential employee, was that the bulk of whatever was in the safe did not belong to the decedent Hurst (GX 4; 72a-73a, 78a, 87a, 97a, 111a).

Mrs. Roth, who admitted that she did not know who owned the money (48a), was permitted to state, over objection, that the decedent "used it for pleasures" (48a-49a).

The question of the ownership of the money developed subsidiary issues of fact:

(a) Was the sum of $2,000 paid Penn Paper & Stock Co. in payment of a debt owing by decedent (16a, 106a-107a)?

(b) Was the sum of $9,000 paid to one Rothman, an Internal Revenue agent who was dead at the time of the trial (112a), paid in respect of a bona fide debt owed to him by the decedent? (81a, 94a-97a, 111a-112a, 135a, 147a, 277a-278a).

(c) Were certain sums paid to others in consequence of informal legacies directed by the decedent? (16a, 72a-73a, 114a-115a, 121a, 136a, 144a).

2. "Tr." refers to the unprinted transcript of testimony.

(iii) A third basic issue under Count 1 concerned the proper valuation of the 1300 shares (155a-156a) of the stock of Dublin Hosiery Co.

That stock was returned at a valuation of $100 a share by petitioner as Hurst's executor (166a-167a, 172a), on the basis of a valuation obtained by him (177a). Its book value was shown to have been between $109 and $110 (215a-216a). However, a large block of this closely-held stock had been sold in July 1949, four months before decedent's death on November 7, 1949 (8a), at $66.67 a share (204a-209a), and the federal tax authorities accepted that figure in that transaction (209a-210a).

If the Dublin Hosiery stock had been properly valued at $66.67 a share, then, even if the amount of cash had been understated as alleged in Count 1, the total estate tax due would have been less than the $112,723.10 actually paid (23a, 103a) by petitioner (157a, 159a, 213a-214a, 219a), and on that basis, as the court charged the jury (254a-255a, 273a-276a), he would have been entitled to an acquittal on Count 1.

The evidence showed that the revenue agent handling the estate tax return now in question did not recommend assessment of a fraud penalty (117a).

(C) *The co-conspirator's evidence.* Before the conspiracy indictment was dismissed for lack of proof, Gurbarg, a revenue agent, was permitted to testify that Carpenter said, in petitioner's presence, that $30,000 had been in decedent's safe when it was opened, and that petitioner remained silent (64a-65a, 68a 69a, 90a-93a, 109a, 110a). This was in July and August 1952 (64a, 90a), a year and a half after the date of the offense charged in Count 1.

Before the conspiracy indictment was dismissed for lack of proof, another revenue agent, Boushee, was permitted to introduce an affidavit executed by Carpenter on April 29, 1955, more than four years after the date of the offense charged in Count 1, that there was $30,500 in the safe of the decedent Hurst at the time of his death (142a).

(D) *Facts bearing on Counts 2 and 3.* Count 2 (3a-4a) charged that petitioner delivered to delegates of the Secretary of the Treasury certain documents known by petitioner to be fraudulent and false, "said documents being memoranda purportedly signed by Winfred S. Hurst, deceased, concerning the ownership of cash found among the effects of said decedent at the time of his death, which documents were forgeries and well known to be forgeries by" petitioner. Count 3 (4a) alleged a similar delivery, but on another date, of knowingly fraudulent documents, including "photostatic copies of documents purportedly signed by Winfred S. Hurst, deceased, but well known by [petitioner] to be forgeries."

The issues thus raised, of forgery versus genuineness, covered a very large portion of the judge's charge to the jury, not only under his discussion of Counts 2 and 3 (281a-288a), but also in his discussion of the alleged forgeries themselves (266a-273a). As has been indicated, the jury found petitioner guilty on Counts 2 and 3 also (1a, 300a).

(E) *Proceedings in the court below.* On petitioner's appeal, timely taken (2a), he urged that (1) the admission of incompetent hearsay testimony vitiated the conviction on Count 1; that (2) dismissal of the conspiracy indictment at the close of the entire

case, which had been tried as one of conspiracy, necessarily deprived him of a fair trial on the substantive indictment; and that (3) Counts 2 and 3 of the indictment did not allege an offense, since Section 7207 of the Internal Revenue Code of 1954 is inapplicable to estate tax matters.[3]

The Government's brief, thereafter filed, states (p. 3):

> "It should be stated at the outset that the United States has, since the taking of the appeal, determined that it does not desire to take any position regarding the conviction on Counts 2 and 3. Accordingly it is agreeable to the United States that Counts 2 and 3 be dismissed or dropped from the case and the sentences thereon vacated." *Accord*, *id.* at p. 19.

In the face of this statement, petitioner argued in his reply brief (pp. 1-4), "The Government's concession that Counts II and III are invalid requires reversal because of the mass of testimony prejudicial to appellant admitted in proof of those counts at the trial."[4]

The court below rejected petitioner's evidentiary contentions (Appendix A, *infra* pp. A3-A7), and rejected likewise, in large measure because no objection thereto had been made at the trial, the petitioner's contention that the dismissal of the conspiracy indictment required a new trial on the substantive charges because testimony relating to the conspiracy prejudiced the bal-

3. The foregoing summary sets forth the headings of petitioner's brief in chief below.

4. This quotation sets forth the heading of the Point I of petitioner's reply brief below.

ance of the case. With respect to Counts 2 and 3 the court below simply said (*infra* p. A7):

> "Appellant next urges most strongly that the convictions on the second and third counts of the first indictment, charging submission of forged documents to the Internal Revenue Service, cannot stand because the statute upon which the indictment is founded does not cover the circumstances in evidence. As to these convictions the government says in its brief that it 'is agreeable that they be dismissed by the court and the sentence thereon vacated.' Accordingly, we shall direct that this be done thus relieving the appellant of the additional fines, aggregating $2,000, imposed under these counts."

REASONS FOR GRANTING THE WRIT.

The basic question presented is whether the Government may properly have the windfall of having the jury influenced against petitioner on one valid count by the use of evidence knowingly introduced under invalid counts, and then after convictions, abandon these invalid counts.

Petitioner does not ask this Court to reanvass the question of evidence decided adversely to him below, nor to review the circumstance that the presence of an indictment for conspiracy permitted introduction of matter which would have been inadmissible against him on the substantive indictment alone. Petitioner concentrates all of his attention on the use by the Government of invalid counts, necessarily known to have been invalid in the primary sense of not alleging offenses, as a vehicle for injecting prejudicial evidence in the trial of the only valid count in a very close case.

First. It is plain that the evidence which was introduced at the trial under cover of Counts 2 and 3—utterly abandoned on the appeal—seriously damaged petitioner's defense on the closely contested issues under Count 1.

Under Counts 2 and 3, the Government introduced a mass of evidence, including the testimony of handwriting experts, in support of the allegations contained therein that petitioner had delivered to Internal Revenue agents documents that "were forgeries and well known to be forgeries" (4a).

The issues thus raised, of forgery versus genuineness, were not simply incidental; they covered a very large portion of the charge to the jury, not only under

the judge's discussion of Counts 2 and 3 (281a-288a), but also in his discussion of the alleged forgeries themselves (266a-273a), because of course if the documents alleged in Counts 2 and 3 to have been forgeries were in fact genuine, then to that extent petitioner did not attempt to defeat and evade his decedent's estate tax as Count 1 alleged that he did.

The jury found peitioner guilty on Counts 2 and 3 (1a, 300a); put more bluntly, they found that he had submitted known forgeries to Internal Revenue officials. Necessarily this conclusion that petitioner was an evil person, carried over into their consideration of Count 1, where, as has been shown, the case was a close one, and where acquittal would have been required either in consequence of a finding that the money[5] found in the decedent's safe belonged to others or from a finding that petitioner had overvalued the block of closely-held Dublin Hosiery stock.

It is hardly necessary to cite authorities for the proposition that, if petitioner had been tried only on Count 1, the prosecution would not have been permitted to introduce evidence tending to establish that he had fobbed off known forgeries as genuine documents; proof of other offenses is always inadmissible. 1 Wigmore, *Evidence* (3d ed. 1940) §§ 192-194. Such evidence should be similarly inadmissible when, as here, the counts under which it could have been intro-

5. If decedent's girl friend, who counted the money in the safe over the weekends (38a) did not know to whom the money belonged (48a), the ordinary presumption that money in a decedent's safe belongs to his estate is swept away. And, surely, the money taken out of the safe and spent on "pleasures" (49a) is not evidence of the ownership of the money left in the safe—especially when the decedent's confidential employee, and witness for the government, told the Internal Revenue agents that the money in the safe did not belong to the decedent, but was for other persons (97a-111a).

duced are invalid, not because of defects in draftsmanship, but because they fail to allege any offense.

It is true that, even under Count 1 alone, evidence bearing on the genuineness or otherwise of the documents would have been admissible to the extent that it bore on the issue of the net amount of the decedent's estate. But, absent Counts 2 and 3, such evidence would have been received under a different accusation, in a different atmosphere, and under a wholly different charge to the jury.

Some trial errors are too glaring for curative action; some passages make too indelible an impression on a jury; for those a new trial is the only remedy. E.g., *United States v. Georga*, 210 F. 2d 45, 47 (C. A. 3); *Oliver v. United States*, 202 F. 2d 521 (C. A. 6). Here, where Counts 2 and 3 are abandoned on appeal pursuant to the Government's concession, but without any instruction to the jury to disregard the evidence thereunder, so that the prejudice is not even sought to be minimized, petitioner is not made whole as to Count 1 by the court of appeals' vacating the $2,000 fine imposed in respect of the invalid counts (*infra* p. A7).

Second. It is likewise plain that Counts 2 and 3 are invalid on their face.

Section 7207, I. R. C. 1954, simply carried forward § 3616(a), I. R. C. 1939. See H. R. Rep. No. 1337, 83d Cong., 2d sess., p. A425; Sen. Rep. No. 1622, 83d Cong., 2d sess., p. 603. This Court has held that § 3616(a), I. R. C., had been impliedly repealed in respect of income tax violations under § 145(b), I. R. C. 1939. *Achilli v. United States*, 353 U. S. 373. And the Government argued in *Achilli* that "A holding that Section 3616(a) reduces the penalties provided by Section

145(b) to those of a misdemeanor would be equally applicable to these various specific felony provisions [including the one making it a felony to attempt to defeat or evade the estate tax, § 894(b)(2)(C)]. It is inconceivable that Congress could have intended or anticipated so drastic a negation of the penalties provided in all these sections." Brief for the U. S., Nos. 430 and 834, Oct. T. 1956, pp. 27-28; *accord*, Memorandum for the U. S., No. 834, Oct. T. 1956, pp. 13-14.

Therefore, under the rationale of *Achilli v. United States*, 353 U. S. 373, Section 7207, I. R. C. 1954, the successor provision to what was there considered, had no application to estate tax offenses. It follows that Counts 2 and 3 were and are invalid on their face.

Third. Petitioner does not understand that the Government contests the proposition just advanced. But what renders the matter so shocking in the present case is that the Government was arguing in this Court the narrow scope of § 3616(a), I. R. C. 1939, at the very time that it was relying on the successor provision, § 7207, I. R. C. 1954, to convict petitioner at his trial in the present case.

Here is the chronology:

Mar. 21, 1957:[6] Government files Memorandum in *Achilli v. United States*, No. 834, Oct. T. 1956, in which it argues (pp. 13-14) "A holding that Section 3616(a) reduces the penalties provided by Section 145(b) to those of a misdemeanor would be equally applicable to these various specific felony provisions [including § 894(b)(2)(C), relating to

6. This date has been verified from the Docket in the Clerk's Office.

estate tax, cited in the paragraph preceding]. It is inconceivable that Congress could have intended or anticipated a negation of the penalties provided in all these provisions."

Mar. 25-Apr. 8, 1957: Petitioner tried and convicted for estate tax violations alleged under § 7207, I. R. C. 1954 (1a).

Apr. 26, 1957: Government files brief on merits in *Achilli v. United States,* Nos. 430 and 834, Oct. T. 1956, in which it repeats and amplifies its argument as to narrow scope of § 3616(a), I. R. C. 1939 (pp. 26-29, quoted in part, pp. 13-14, *supra*).

May 27, 1957: Opinion in *Achilli,* 353 U.S. 373, sustaining Government's views as to narrow scope of § 3616(a), I. R. C. 1939.

June 3, 1957: Petitioner files supplement to motion for acquittal, new trial, etc. (1a), alleging *inter alia* invalidity of Counts 2 and 3 laid under § 7207, I. R. C. 1954, and resultant prejudice to him on Count 1 (306a, quoted *supra*, p. 4).

July 25, 1957: Petitioner's motion for new trial, etc., denied (1a).

Sept. 19, 1957: Petitioner's motion for reconsideration filed (1a), and denied (2a); petitioner sentenced (2a).

Fourth. It is thus plain that, during and after the time that the Government was urging upon this Court the inapplicability of § 3616(a), I. R. C. 1939, to estate tax violations, it was prosecuting petitioner for an estate tax offense under the successor provision, § 7207,

I. R. C. 1954; it was defending against his motion for a new trial; and it was succeeding in having him sentenced for a violation of § 7207 in an estate tax matter.

The nub of this case is that the Government obtained a conviction on a close set of facts with the aid of evidence introduced under counts that, on the Government's contemporaneous contentions in this Court, and under this Court's decisions, did not state offenses. Having obtained the conviction, the invalid counts are abandoned—but the evidence introduced thereunder remains, and the conviction to which it so significantly contributed is affirmed.

Petitioner submits that this hit and run conduct on the part of the prosecution plainly deprived him of a fair trial, and involves such a departure from the accepted course of proceedings in criminal case as to call for an exercise of this Court's supervisory jurisdiction.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Counsel for the Petitioner.

June 1958.

APPENDIX A.

Opinion Below.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,404

UNITED STATES OF AMERICA,

v.

HARRY J. ALKER, JR.,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted March 20, 1958

Before: KALODNER, STALEY and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed May 15, 1958)

HASTIE, *Circuit Judge.*

The appellant was tried on two indictments. The first charged him in one count with violating Section 894 (b) (2) (C) of the Internal Revenue Code of 1939, 26 U.S.C. § 894 (b) (2) (C), by willfully attempting to evade part of the

estate tax due on the estate of Winfred S. Hurst, deceased. The second and third counts of this indictment charged violations of Section 7207 of the Internal Revenue Code of 1954, 26 U.S.C. § 7207, in the submitting of false and fraudulent documents to the Secretary of the Treasury. The second indictment charged that the appellant and two others conspired to commit the substantive offenses of the first indictment. After the prosecution had presented its case, the district court granted a motion to dismiss the conspiracy charges. The jury subsequently found the appellant guilty of the substantive offenses on all three counts of the first indictment. He was sentenced to six months imprisonment on each count, the terms to run concurrently, and was fined $8,000 on the first count and $1,000 on each of the others. Various errors are alleged on this appeal.

The government sought to prove that the day after Winfred Hurst died, the defendant, who was his executor, removed $35,000 belonging to Hurst from Hurst's safe, and thereafter did not report this money in the estate tax return as part of the assets of the estate. Government witnesses testified that the day after Hurst's death, appellant met in the decedent's office with four beneficiaries under the will; that the defendant then opened Hurst's safe, and took out seven packages of money. The testimony as to what occurred next is exemplified by the following excerpt from the examination of Jane Roth, a prosecution withness who was one of those present at the opening of the safe:

> Q. "Did anything come out of the safe?"
>
> A. "There was money . . . . ."
>
> Q. "If you know, how much money?"
>
> A. "When Mr. Alker was taking it out of the safe, he said something about—there were bundles of money, and he said something about it being $500 in each bundle, and Mr. Carpenter corrected him, and said 'No. $5,000.00' ".

Defense Counsel: "I object and move that that be stricken, sir."

The Court: "Overruled".

It appeared that appellant made no reply when he was thus corrected.

The appellant now asks us to find the testimony of what Carpenter said about the amount of money in each bundle inadmissible and prejudicial hearsay. However, we think this is a very clear and striking example of evidence receivable as an admission by adoption.

Rule 26 of the Federal Rules of Criminal Procedure, directs that the admissibility of evidence shall be governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." 18 U.S.C., Rules of Criminal Procedure, Rule 26. The basis upon which adoptive admissions stand as competent evidence was stated by Mr. Justice Curtis one hundred years ago:

> ". . . these declarations . . . made in the presence of all the defendants, . . . were of such a character, and made under such circumstances, as imperatively to have required them to deny their correctness if they were untrue; and therefore they were clearly admissible." *Turner et al. v. Yates,* 1853, 16 How. 14, 27. Accord, *Sparf v. United States,* 1895, 156 U.S. 51. For an elaboration of the doctrine, see 4 WIGMORE, EVIDENCE §§ 1071, 1072.

Here an occasion had been arranged for an executor to take possession of the contents of his decedent's safe in the presence of legatees. One of the most obvious and important purposes of such an assemblage is to obviate any future dispute or suspicion about the nature and amount of the property which the executor is taking into his hands. And in any event, it is important to the executor

as a responsible fiduciary that there be independent witnesses to corroborate him as to the amount of property for which he is accountable. In these circumstances there is normally a very clear and strong inference of the executor's assent to be drawn from his failure to challenge a substantial verbal correction voiced on such an occasion as this in response to the executor's own statement of the amount being taken into his possession. There is no suggestion here that the appellant did not understand what was said to him or that he was prevented from replying, or that the circumstances were in any way extraordinary. It was entirely proper that the jury should be permitted to draw the normal inference of assent from the appellant's silence.

Even if this evidence had been technically inadmissible, the error would not have been substantial in the circumstances of this case. Quite apart from this questioned testimony there were in evidence some six separate direct statements by the appellant, three in written communications concerning the estate tax liability, admitting that a sum between $30,000 and $35,000 had been found in the office of the deceased but arguing that most of this belonged to other persons. Thus, the argument was not whether about $3,000 or about $30,000 had been found in the safe but whether the larger sum, admittedly found, constituted assets of the estate. The adoptive admission to which appellant objects was at most only a slight makeweight added to an already overwhelming group of unchallenged explicit admissions, both written and oral, of the same relevant fact.

Appellant's next argument is that the dismissal of the conspiracy indictment at the close of the government's case required a new trial on the substantive charges because testimony introduced with reference to the conspiracy p judiced the rest of the case. This contention was not advanced at trial and no request was made even that the jury be cautioned against improper use of testimony which appellant, now for the first time, views with concern. This

is not to criticize able trial counsel. For on the record counsel seems not to have found and we have not found any substantial basis for apprehension. Indeed, the line of testimony of which appellant complains principally in this connection is the very statement—which happens to have been made by an alleged co-conspirator—about the amount found in the safe which we already have ruled admissible as an adoptive admission. This was as competent in first instance on the substantive counts as under the conspiracy charge.

The second item said to have been prejudicial is a hearsay statement made by an alleged co-conspirator on the same subject, but not in the presence of the appellant. But here again, such an overwhelming body of clearly competent evidence establishes without serious contradiction that $30,000 or more had been removed from the safe, that a single hearsay reaffirmation of the same fact cannot be viewed as reversible error.

Appellant next urges most strongly that the convictions on the second and third counts of the first indictment, charging submission of forged documents to the Internal Revenue Service, cannot stand because the statute upon which the indictment is founded does not cover the circumstances in evidence. As to these convictions the government says in its brief that it "is agreeable that they be dismissed by the court and the sentence thereon vacated." Accordingly, we shall direct that this be done thus relieving the appellant of the additional fines, aggregating $2,000, imposed under these counts.

All other points made in the brief and the reply brief of the appellant have been fully considered. We are not persuaded by any of them.

The judgment and commitment will be affirmed as to count one of the indictment and reversed as to counts two and three.

APPENDIX B.

Judgment Below.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,404

UNITED STATES OF AMERICA

v.

HARRY J. ALKER, JR.,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: KALODNER, STALEY and HASTIE, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted on briefs.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment and commitment in this case be, and the same is hereby affirmed as to count one of the indictment and reversed as to counts two and three.

Attest:

IDA O. CRESKOFF,
Clerk

May 15, 1958

APPENDIX C.

Statutes Involved.

1. Section 894(b)(2)(C) of the Internal Revenue Code of 1939 provided as follows:

"§ 894. Penalties

* * *

"(2) Criminal.

* * *

"(C) Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

2. Section 3616(a) of the Internal Revenue Code of 1939 provided as follows:

"§ 3616. Penalties

"Whenever any person——

"(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment in-

tended to be made; * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

3. Section 7207 of the Internal Revenue Code of 1954 provides as follows:

"§ 7207. Fraudulent returns, statements, or other documents

"Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both."

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 100

HARRY J. ALKER, JR., PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. A3-A7) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1958 (Pet. A8), and the petition for a writ of certiorari was filed on June 12, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner was convicted on all counts of a three-count indictment alleging that he had (1) wilfully at-

tempted to evade and defeat a large part of the federal estate tax imposed upon the Estate of Winfred S. Hurst by filing a false estate tax return in 1951, understating the decedent's cash on hand; (2) wilfully delivered to the Treasury Department on April 7, 1955, certain documents which he knew to be false, fraudulent and forged, concerning the ownership of cash by Hurst at the time of his death; and (3) wilfully delivered to the Treasury Department on April 29, 1955, certain documents which he knew to be false, fraudulent and forged, concerning the assets of Hurst. On appeal, with the consent of the Government, the Court of Appeals dismissed Counts 2 and 3, vacated the sentences on those counts, and affirmed the conviction on Count 1.

The question presented is whether petitioner is entitled to a new trial on Count 1 by reason of the dismissal of Counts 2 and 3.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 894. PENALTIES

* * * * *

(b)(2)(C) Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and,

upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 894.)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False returns.* Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 3616(a).)

Internal Revenue Code of 1954:

SEC. 7207. FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

(26 U.S.C. 1952 ed., Supp. V, Sec. 7207.)

STATEMENT

On March 8, 1956, two indictments were filed against petitioner in the United States District Court for the Eastern District of Pennsylvania. (R. 1a, 3a-4a.) The first, which charged him with conspiracy, was dismissed at the close of all the evidence. (R. 248a.) The second indictment charged that petitioner had (1) wilfully attempted to evade and defeat a large part of the federal estate tax imposed upon the Estate of Winfred S. Hurst by filing a false estate tax return in February, 1951, understating the decedent's cash on hand; (2) wilfully delivered to the Treasury Department on April 7, 1955, certain documents which he knew to be false, fraudulent and forged, concerning the ownership of cash by Hurst at the time of his death; and (3) wilfully delivered and caused to be delivered to the Treasury Department on April 29, 1955, certain documents which he knew to be false, fraudulent and forged, concerning the assets of Hurst. (R. 1a, 3a-4a.)[1] Count 1 alleged a violation of Section 894(b)(2)(C) of the Internal Revenue Code of 1939; Counts 2 and 3, Section 7207 of the Internal Revenue Code of 1954. (R. 3a-4a.)

After a jury trial petitioner was found guilty on all three counts. (R. 300a.) On September 19, 1957, he was sentenced to six months imprisonment on each count, the sentences to run concurrently, and fined $8,000 on Count 1, $1,000 on Count 2 and $1,000 on Count 3. (R. 2a, 301a.) In its brief in the Court of Appeals, the Government stated (p. 3) that it did "not

[1] The record filed in this Court consists of (1) the one-volume appellant's appendix in the Court of Appeals, with pages numbered from 1a to 308a; (2) the one-volume appellee's appendix in the Court of Appeals, with pages numbered 1b to 23b; and (3) the exhibits introduced into evidence by the Government.

desire to take any position regarding the conviction on Counts 2 and 3. Accordingly it is agreeable to the United States that Counts 2 and 3 be dismissed or dropped from the case and the sentences thereon vacated." The Court of Appeals affirmed the conviction on Count 1 and dismissed Counts 2 and 3. (Pet. A7.)

The evidence to support the verdict, the sufficiency of which is not challenged, may be summarized briefly as follows:

Petitioner is a practicing attorney in Philadelphia, experienced in estate tax matters. (R. 25a, 122a.) Winfred S. Hurst, a Philadelphia certified public accountant, died on November 7, 1949, naming petitioner the executor of his will. (R. 8a-9a, 2b.) Petitioner probated Hurst's will on November 12, 1949 (R. 8a), prepared the federal estate tax return, and filed it on February 5, 1951 (R. 10a, 12a; Govt. Ex. 2). In executing this return, petitioner stated that it listed, to the best of his knowledge and belief, all of the property constituting the gross estate of Hurst. (R. 11a, 12a-13a.) Reported on the return was a total gross estate of $629,079.80, including "cash on hand belonging to decedent", $3,046.93 (R. 17a; Govt. Ex. 2, Schedule C); and a net estate of $386,885.75 (R. 15a, 17a).

Hurst had died suddenly of a cerebral hemorrhage. (R. 8b-9b; Govt. Ex. 2.) The morning after his death there were present in Hurst's office petitioner, Mrs. Clara Roth and her daughter, close friends of Hurst, one Carpenter, an employee of Hurst, and another person. (R. 26a, 47a, 68a, 2b-3b.) In the presence of the others, petitioner removed seven packages of currency from Hurst's safe and placed them in a black

brief case. (R. 27a-29a.) Petitioner remarked that each of the seven packs—which were wrapped in paper bands—contained $500, but Carpenter corrected him, stating that each pack contained $5,000. Petitioner made no reply. (R. 34a, 35a-36a, 52a, 53a, 22b-23b.) Petitioner put the money in his brief case and left with it, taking it to his own office. (R. 40a, 53a-54a, 64a-65a, 23b.) The estate tax return, filed in 1951, omitted this $35,000, which omission resulted in a tax deficiency of $9,904.91. (R. 65a, 75a; Govt. Ex. 2, Schedule C.)

In the summer of 1952, petitioner and Carpenter had two conferences with a Treasury agent named Gurbarg. On the first of these occasions Carpenter, who was then working for petitioner on the Hurst estate, stated that there had been $30,000 in Hurst's safe at the time of his death; that with it there had been a note or an envelope on which was written the name of a revenue agent named Rothman; that shortly afterward Carpenter told petitioner that Rothman wanted the money, whereupon petitioner removed it from his safe and gave it to Carpenter, who delivered it to Rothman; that he had obtained no receipt; that Rothman had since died; and that Carpenter thought it was "money that they were using to bet on the horses, gambling". (R. 64a-67a, 95a.) Petitioner stated "I had nothing to do with it", though he did not dispute Carpenter's version of the facts. (R. 86a-87a; 108a-109a.) At the second conference in the summer of 1952, Carpenter gave substantially the same testimony, except that he stated, in petitioner's presence, that he had always felt that the $30,000 paid to the deceased agent represented bribe money. (R. 68a-69a, 97a.)

On January 11, 1954, petitioner wrote a letter to Agent Gurbarg advising him that Carpenter had stated

to petitioner that the $35,000 in Hurst's safe belonged not to Hurst but to four named companies which had been clients of Hurst. (R. 72a-73a.) Petitioner explained that he had excluded the $35,000 from the estate tax return because he "did not regard them as Mr. Hurst's moneys * * *" (R. 73a.) This explanation was entirely false. (R. 15a-17a, 48a-49a, 60a-61a, 114a-115a, 272a, 18b-20b; Govt. Ex. 2, Schedules F and K; Govt. Ex. 4.) Notwithstanding its falsity, petitioner advanced the same version of the facts in a petition filed in the Tax Court on March 23, 1954. (R. 119a-121a; Govt. Ex. 6, p. 3.) In that document, petitioner stated that the $35,000 "was in decedent's office in various envelopes, marked the property of" the four named firms; and that "The cash was delivered to the owners or their nominee." (Govt. Ex. 6, p. 3.)

Still later, petitioner gave another explanation of the ownership and disposition of the funds. At a conference with officials of the Internal Revenue Service on April 7, 1955, petitioner stated that there had been a cash fund of $30,500 in the estate; that $11,250 had been paid by petitioner to one Pullinger, a former assistant of Hurst, for distribution to two other persons to whom Hurst had owed money; that $9,000 had been paid to Rothman, the deceased revenue agent; and that petitioner was restoring to the estate some $16,000 out of his own pocket. (R. 121a, 132a-134a, 144a-146a.) To substantiate his story, petitioner presented two alleged receipts from Pullinger (R. 133a; Govt. Ex. 11) and three undated memoranda purportedly signed by Hurst, authorizing the distributions to Pullinger and Rothman (R. 124a-128a, 135a-136a; Govt. Exs. 7, 8 and 9). This explanation was false and several of the documents submitted by petitioner were forgeries. (R. 17a, 168a,

270a, 272a, 280a, 16b; Govt. Ex. 2, Schedule K, Govt. Exs. 16 and 17; Pet. 11.)

On April 29, 1955, there was presented to the Internal Revenue Service a group of schedules and statements prepared by a firm of certified public accountants from information furnished by petitioner, accompanied by petitioner's affidavit asserting the truth of the facts set forth. (R. 131a, 139a, 142a, 161a-163a; Govt. Ex. 15.) Included was an affidavit by Carpenter stating that when Hurst died his office safe contained $30,500 in cash. (R. 142a; Govt. Ex. 15, Schedule A-4(2).) The allegations as to the disposition of this cash were in general accordance with those made at the conference held three weeks earlier, and were supported by the same forged documents petitioner had then presented. (R. 139a-144a; Govt. Ex. 15, Schedules A-4(4), A-4(6) and A-4(7).)

Petitioner, testifying in his own defense at the trial, denied that he had seen any cash in Hurst's safe and accused five Government witnesses of not telling the truth. (R. 174a-175a, 16b-18b.)[2]

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[2] The defense also advanced the contention that any omission of cash from the estate tax return was more than offset by the alleged overvaluation of 1,300 shares of stock in the Dublin Hosiery Company. This stock had been reported by petitioner at a value of $100 per share. Several months before Hurst's death a large block of it had been sold by another estate for $66.67 per share. (R. 155a-156a, 167a, 171a-172a, 203a-206a.) Petitioner knew about this sale at the time, having negotiated it himself as counsel for the corporation and a member of the board of directors, but testified that he had forgotten about it. (R. 172a-177a, 204a-207a.) The trial judge instructed the jury that they must acquit petitioner on Count 1 unless they were convinced beyond a reasonable doubt that the value of the Dublin stock was in excess of $66.67 per share. (R. 273a-275a.)

ARGUMENT

Petitioner contends (Pet. 11-16) that his defense to the first count of the indictment was prejudiced by evidence, admitted under the second and third counts, that petitioner had submitted forged documents to the Treasury Department; that the latter counts are invalid on their face; and that evidence admitted under them would have been admissible under Count 1 only "to the extent that it bore on the issue of the net amount of the decedent's estate" (Pet. 13). The argument is without merit. It is clear that the evidence complained of would have been admissible under the first count even if it had stood alone. Count 1 alleged that petitioner had wilfully attempted to evade a large part of the tax on Hurst's estate by filing a false return *improperly* omitting $35,000 of cash on hand. (R. 3a.) The forged documents submitted by petitioner to the Internal Revenue Service four years later were plainly designed to substantiate petitioner's false contention that any cash found in Hurst's safe after his death belonged to persons other than Hurst and hence was *properly* excluded by petitioner from the estate tax return. (*Supra*, pp. 7-8.) It is well settled that fabrication of evidence of innocence is cogent evidence of guilt. *Wilson* v. *United States*, 162 U.S. 613, 620-621; *Harris* v. *United States*, 169 F. 2d 887 (C.A. D.C.), certiorari denied, 335 U.S. 872; *United States* v. *Werner*, 160 F. 2d 438, 441 (C.A. 2d); *Stanley* v. *United States*, 245 F. 2d 427, 433 (C.A. 6th); *Harvey* v. *United States*, 215 F. 2d 330, 332 (C.A. D.C.); *Andrews* v. *United States*, 157 F. 2d 723, 724 (C.A. 5th) and cases cited; *United States* v. *Graham*, 102 F. 2d 436, 442-443 (C.A. 2d), certiorari denied, 307 U.S. 643; II Wigmore, *Evidence* (3d ed.) § 278; Cf. *United States* v. *Adonis*, 221 F. 2d 717, 719-720 (C.A.

3d). It follows that the evidence of petitioner's submission to the Internal Revenue Service in 1955 of false exculpatory explanations, supported by forged documents, clearly would have been admissible under the first count even if that count had stood alone, just as the evidence of petitioner's false explanations in 1954 (*supra*, pp. 6-7) was admissible.[3]

Petitioner also makes the contention (Pet. 13-15) that Counts 2 and 3 are invalid on their face. These counts were dismissed on appeal on the Government's suggestion because of doubts concerning the proper application of Section 7207 of the Internal Revenue Code of 1954, following *Achilli* v. *United States*, 353 U.S. 373.[4] The Government is considering clarifying legislation. In view of the action taken by the court below, there is no occasion, under the circumstances of this case, for the Court to reach that question.

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[3] Petitioner recognizes the close relationship among the three counts: "* * * of course if the documents alleged in Counts 2 and 3 to have been forgeries were in fact genuine, then to that extent petitioner did not attempt to defeat and evade his decedent's estate tax as Count 1 alleged that he did." (Pet. 12.)

[4] The *Achilli* case, decided two months after the trial of petitioner began, held that Section 3616(a) of the Internal Revenue Code of 1939, the predecessor of Section 7207 of the Internal Revenue Code of 1954, does not apply to income tax violations.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1958.

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IN THE

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October Term, 1958.

No. 100.

HARRY J. ALKER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner's Reply Memorandum.

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PETITIONER'S REPLY MEMORANDUM

The nature of the Government's opposition renders appropriate—and necessary—a few words in reply.

First. The government says (Br. Op. 10) that Counts 2 and 3, alleged by petitioner to be invalid on their face (Pet. 13-15), "were dismissed on appeal on the Government's suggestion because of doubts concerning the proper application of Section 7207 of the Internal Revenue Code of 1954, following *Achilli v. United States*, 353 U. S. 373."

Inasmuch as petitioner argued at some length in his brief below (Brief for Appellant, 20-27) that "Counts 2 and 3 of the Indictment Did Not Allege an Offense, Since Section 7207 of the Internal Revenue Code of 1954 is Inapplicable to Estate Tax Matters," the Government's statement is thoroughly misleading. The fact is that the Government never for one moment admitted the invalidity of those counts at any time in the district court, and did not do

so anywhere until after petitioner's brief in chief was filed in the court below. See Pet. 14-15. To intimate, as the Government does, that the counts "were dismissed on appeal on the Government's suggestion because of doubts" (Br. Op. 10), is on a par with—and about as accurate—as saying that Cornwallis surrendered at Yorktown at his own suggestion. The fact is that in both instances the yielding took place in consequence of force applied by the opposition.

Second. The Government argues (Br. Op. 9) that "the evidence complained of would have been admissible under the first count even if it had stood alone." Petitioner conceded (Pet. 13) that, "even under Count 1 alone, evidence bearing on the genuineness or otherwise of the documents would have been admissible to the extent that it bore on the issue of the net amount of the decedent's estate."

The nub of petitioner's contention then followed:

> "But, absent Counts 2 and 3, such evidence would have been received under a different accusation, in a different atmosphere, and under a wholly different charge to the jury."

The Government has not even attempted to formulate a reply to this basic argument, which sets forth exactly why petitioner's conviction is tainted.

Third. The Government states (Br. Op. 10) that it "is considering clarifying legislation." Such a remedy, when and if it comes to pass, will not help petitioner in confinement. It is submitted that the conduct reflected in the present record, of the prosecution blowing cold in *Achilli* to urge that Section 7207 does not reach estate tax offenses (Pet. 13-14), and simultaneously blowing hot in the present case to convict petitioner for estate tax offenses under the same statute, and of then availing itself of the damaging evidence introduced thereunder to sustain the present conviction, meanwhile discarding the counts laid under Section 7207 so that an entirely different case remains, calls for

review of this case now. Improper closing argument (*Berger v. United States*, 295 U. S. 78; *Viereck v. United States*, 318 U. S. 236) should not be the only departure from accepted standards of prosecutor conduct that calls for review by this Court.

Respectfully submitted,

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July 1958.